No. 06-1565 MAY 23 2007

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In The

Supreme Court of the United States

SCOTT LYNN TAYLOR,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit, distinguishing itself from the other circuits, continues to refuse to apply correctly this Court's standard governing motions for a certificate of appealability – *see Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); and *Tennard v. Dretke*, 542 U.S. 274 (2004) – by failing to analyze whether petitioner's habeas claim is debatable among jurists of reason, whether a court could resolve the issue in a different manner, and whether the issue is adequate to deserve encouragement to proceed further.

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PETITION FOR A WRIT OF CERTIORARI

Scott Lynn Taylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Sixth Court of Appeals of Texas in cause number 06-98-00072-CR (Appendix J) is reported at 995 S.W.2d 279. The opinion of the Sixth Court of Appeals of Texas in cause number 06-98-00073-CR (Appendix K) is not reported. The opinions of the Texas Court of Criminal Appeals (Appendix I) are reported at 55 S.W.3d 584. The Order of the United States Supreme Court denying certiorari (Appendix H) is reported at 534 U.S. 1154. The Orders of the Texas Court of Criminal Appeals denying habeas corpus relief (Appendices F & G) are not reported. The Final Report and Recommendation of the United States Magistrate Judge (Appendix E), the Final Judgment (Appendix D), and the Order of Dismissal (Appendix C) are not reported. The Order of the District Court denying a certificate of appealability (Appendix B) is not reported. The Order of the Fifth Circuit denying a certificate of appealability (Appendix A) is not reported. The Order of the Fifth Circuit denying panel reconsideration (Appendix L) is not reported.

JURISDICTION

The Fifth Circuit denied reconsideration of its order denying a certificate of appealability on February 23, 2007. This petition is being filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . . "

STATUTORY PROVISION

Title 28, section 2253(c)(2) of the United States Code provides, in pertinent part, "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

A. Summary Of The Issue

This case offers this Court an opportunity to clarify the proper application of 28 U.S.C. § 2253(c) of the Anti-terrorism and Effective Death Penalty Act, which bars appeal from a final order in a habeas corpus proceeding unless the district judge or a circuit judge issues a certificate of appealability (COA). A COA may issue only if the petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has interpreted that language to mean that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Adjudication under a relatively open-ended standard like § 2253(c) will rarely yield an overt "split" among the circuit courts as a matter of law. Nonetheless, application of the COA standard may yield divergent tendencies in different jurisdictions, and in such instances this Court has stepped in to clarify the proper application of the standard. The present case is the latest in a series of episodes in which the Fifth Circuit has resisted this Court's balanced interpretation of § 2253(c). Three times in the last four years, this Court has reversed previous efforts by the Fifth Circuit to narrow drastically the range of cases in which a COA may issue. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*, for example, this Court chastised the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." 542 U.S. at 283.

As the present case demonstrates, the Fifth Circuit continues to deviate from this Court's instructions in two respects. First, it seeks to avoid the implications of *Miller-El* and similar decisions by issuing boilerplate, form orders that state the constitutional claim, cite the standard of review, and summarily deny COA without explaining why the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further. Second, its rejection of petitioner's claim – notwithstanding findings below that petitioner demonstrated that his trial counsel performed deficiently – indicates that the Fifth Circuit continues to use COA determinations as an opportunity to decide the *merits* of the appeal, not simply to determine whether the claim is fairly debatable. In so doing, the Fifth Circuit ignores this Court's clear command in *Miller-El*.

Petitioner filed a federal habeas corpus petition alleging, *inter alia*, that he was denied the effective assistance of counsel because counsel failed to prove that he had standing to challenge the search of his property. The Magistrate Judge conducted an evidentiary hearing and found that counsel performed deficiently in failing to prove that petitioner had standing as an overnight guest and in failing to preserve the Fourth Amendment issue for appeal. However, it concluded that the deficient performance did not prejudice petitioner because there is no reasonable probability that the motion to suppress would have been granted had counsel proven that petitioner had standing. The District Court adopted the Magistrate Judge's Report and Recommendation and denied a COA, as did the Fifth Circuit.

The Fifth Circuit erred in denying a COA and in continuing to refuse to apply this Court's standard of review correctly. Petitioner proved at the federal evidentiary hearing that the police intentionally included false statements in and omitted material information from the search warrant affidavit; that the search warrant for the residence did not authorize the police to search petitioner's property; that the search warrant was not issued by a neutral, detached magistrate; and that the good faith exception to the warrant requirement does not apply. Because the District Court concluded that counsel performed deficiently and petitioner proved that the search warrant was invalid, petitioner made a substantial showing of the denial of a constitutional right. The Fifth Circuit should have issued a COA. Its failure to do so and its refusal to apply the standard correctly constitute an unacceptable departure from the usual course of judicial proceedings and conflict with relevant decisions of this Court. Accordingly, this Court should exercise its supervisory powers and grant certiorari.

B. Procedural History

Petitioner was indicted for possession of amphetamine and possession of cocaine. He pled not guilty. The jury convicted him and assessed his punishment in each case at 99 years in prison and a $10,000 fine on February 18, 1998.

The Sixth Court of Appeals of Texas affirmed petitioner's conviction in a published opinion issued on June 15, 1999. *Taylor v. State*, 995 S.W.2d 279 (Tex. App. – Texarkana 1999). The Court of Criminal Appeals initially granted discretionary review but ultimately dismissed the

petition as improvidently granted in a published opinion issued on September 12, 2001. *Taylor v. State*, 55 S.W.3d 584 (Tex. Crim. App. 2001). The United States Supreme Court denied certiorari on February 19, 2002. *Taylor v. Texas*, 534 U.S. 1154 (2002).

Petitioner filed a state habeas corpus application on February 13, 2003. The district court, without conducting a hearing, made no findings of fact, conclusions of law, or recommendation. The Court of Criminal Appeals denied relief without written order on April 30, 2003. *Ex parte Taylor*, Nos. WR-55,369-01 & -02 (Tex. Crim. App. 2003) (unpublished).

Petitioner filed a federal habeas corpus petition on May 5, 2003, alleging, *inter alia*, that he was denied the effective assistance of counsel because counsel failed to prove that he had standing to challenge the search of his property. The Magistrate Judge conducted an evidentiary hearing on January 18, 2006, found that counsel performed deficiently in failing to preserve the Fourth Amendment issue for appeal, but concluded that the deficient performance did not prejudice petitioner because there is no reasonable probability that the motion to suppress would have been granted had counsel proven that petitioner had standing. The District Court denied relief on March 6, 2006, and a COA on April 5, 2006.

Petitioner filed a motion for a COA in the Fifth Circuit on May 30, 2006, which a circuit judge denied on December 19, 2006. Petitioner filed a motion for panel reconsideration on January 4, 2007, which the Fifth Circuit denied on February 23, 2007.

REASON FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN CONTINUING TO REFUSE TO APPLY CORRECTLY THIS COURT'S STANDARD GOVERNING MOTIONS FOR A CERTIFICATE OF APPEALABILITY BY FAILING TO ANALYZE WHETHER PETITIONER'S HABEAS CLAIM IS DEBATABLE AMONG JURISTS OF REASON, WHETHER A COURT COULD RESOLVE THE ISSUE IN A DIFFERENT MANNER, AND WHETHER THE ISSUE IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

A. The Background

Police officers received information from an informant that petitioner had brought drugs to Donald Hall's house in Sulphur Springs, Texas. They went to the house to look for petitioner. One officer maintained surveillance on the house; the others left to obtain a warrant to search it. While the police were obtaining the warrant, petitioner drove away from the house. The officer who was watching the house stopped him for a traffic violation and arrested him after he refused to consent to a search of his car.

Officers executed the search warrant at the house while petitioner was in custody at the police station. Hall, who was at home alone, admitted that the house was his and that "a friend left some stuff there last night." Officers searched a bedroom and found a black leather bag containing amphetamine and cocaine. Hall told the officers that he previously bought drugs from petitioner and, as far as he knew, the drugs belonged to petitioner.

Petitioner was indicted for possession of amphetamine and possession of cocaine in the 8th District Court of

Hopkins County, Texas. He pled not guilty. Trial counsel moved to suppress the drugs but did not prove under *Minnesota v. Olson*, 495 U.S. 91 (1990), that petitioner had standing as an overnight guest to object to the search of his luggage located in Hall's house. The trial court denied the motion to suppress, concluding that petitioner lacked standing. The jury convicted him and assessed his punishment in each case at 99 years in prison and a $10,000 fine.

The Sixth Court of Appeals of Texas concluded that petitioner did not have standing to challenge the search of his property because he was not an overnight guest. The Texas Court of Criminal Appeals granted discretionary review of this opinion "because it appeared that the . . . analysis was incorrect and in conflict with federal precedent." *Taylor v. State*, 55 S.W.3d 584, 585 (Tex. Crim. App. 2001) (Johnson, J., concurring). Thereafter, that Court dismissed the petition as improvidently granted, apparently because the trial objection did not comport with the appellate complaint; three judges dissented in a published opinion and would have remanded for consideration of the merits even though petitioner did not contend in the trial court that he was an overnight guest. Thus, the Court of Criminal Appeals was prepared to recognize that he was an overnight guest and reverse his conviction; it did not do so because counsel failed to object on that basis.

Petitioner's federal habeas corpus petition alleged, *inter alia*, that he was denied the effective assistance of counsel because counsel failed to prove that he had standing to challenge the search of his property. The Magistrate Judge conducted an evidentiary hearing; found that petitioner was an overnight guest, had standing to challenge the search of his luggage, and that counsel performed

deficiently in failing to preserve the Fourth Amendment issue for appeal; but it concluded that petitioner was not prejudiced because there is no reasonable probability that the motion to suppress would have been granted had counsel proven that petitioner had standing. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). The District Court adopted the Magistrate Judge's Report and Recommendation and denied habeas relief and a COA.

Petitioner requested the issuance of a COA from the Fifth Circuit on the following issue:

> Where the district court concluded that [petitioner] had standing as an overnight guest to object to the search of his property and that trial counsel performed deficiently in failing to preserve the Fourth Amendment issue for appeal, whether the district court erred in holding that [petitioner] was not prejudiced even though:
>
> 1. the search warrant affidavit included false statements and omitted information material to the probable cause inquiry;
>
> 2. the search warrant for Donald Hall's house did not authorize the police to search [petitioner's] property; and
>
> 3. the search warrant was not issued by a neutral, detached magistrate.

In a two-paragraph order denying a COA, Judge Rhesa Hawkins Barksdale summarized petitioner's habeas claim and concluded:

> A COA may issue only if Taylor makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Taylor has

> made no such showing[;] accordingly, his motion for a COA is DENIED.

The order did not address whether the habeas claim is debatable among jurists of reason, whether a court could resolve the issue in a different manner, and whether the issue is adequate to deserve encouragement to proceed further.

B. The COA Standard Of Review

An appeal from a district court's denial of a petition for a writ of habeas corpus where the petitioner's confinement results from a state court process requires that a district or circuit judge issue a COA. 28 U.S.C. § 2253(c)(1). A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A "substantial showing" means that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. at 483-84; *see also Barefoot v. Estelle*, 463 U.S. 880, 893, and n. 4 (1983) (announcing pre-AEDPA standard for issuance of certificate of probable cause, which Congress codified in 28 U.S.C. § 2253(c)).

This Court clearly articulated and reinforced the COA standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The COA determination requires an overview of the claims in the habeas petition, a general assessment of their merits, and an examination of the District Court's application of the AEDPA to the claims; but the petitioner need not show that the appeal will succeed. *Id.* at 336-37. A "court of appeals should not decline the application for a COA

merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. Although a COA should not issue as a matter of course, petitioners should receive the benefit of "close calls," as it is "consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* A petitioner does not even have to prove that some jurists would grant habeas relief. *Id.* at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that petitioner will not prevail." *Id.*

C. The Fifth Circuit Continuously Refuses To Apply The COA Standard Correctly.

The Fifth Circuit incorrectly applied the standard governing the issuance of a COA because it did not even generally assess the merits of petitioner's claim. Reasonable jurists could debate whether petitioner's motion to suppress would have been granted. Neither the District Court nor the Fifth Circuit fully considered the substantial evidence developed at the evidentiary hearing in support of the claim. Both concluded without explanation that trial counsels' deficient performance did not prejudice petitioner. Their failure to generally assess the merits of the Fourth Amendment claim is especially inexcusable where no state court has ever addressed the merits.[1]

Petitioner's case is worthy of certiorari review because it demonstrates that the Fifth Circuit continues to refuse

[1] The state habeas court did not reach the merits of the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice prong because it did not conclude that counsel performed deficiently.

to apply correctly this Court's standard governing the issuance of a COA. This Court has not had to admonish any other circuit for failing to apply this standard correctly, but on three occasions it has reprimanded the Fifth Circuit for failing to do so. In addition to *Miller-El*, this Court reversed the Fifth Circuit for denying a COA in *Banks v. Dretke*, 540 U.S. 668 (2004), and *Tennard v. Dretke*, 542 U.S. 274 (2004).[2] Indeed, in *Tennard*, the Court chastised the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." 542 U.S. at 283.

Perhaps in response to these reversals, the Fifth Circuit now frequently issues boilerplate, form orders that state the constitutional claim, cite the *Slack v. McDaniel* standard, and summarily deny COA without explaining why the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further. The Fifth Circuit arguably uses these orders hoping that, by withholding its reasoning for denying COA, the orders are immune from certiorari review. Such cursory consideration of constitutional claims cannot be adequate to meet the standard imposed by this Court.

This case is exceptional because of its history in state court on direct appeal. The Texas Court of Criminal Appeals granted discretionary review of the lower court of

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[2] In *Banks*, this Court held that the Fifth Circuit erred in denying a COA on whether Federal Rule of Civil Procedure 15(b) extends to habeas corpus proceedings. In *Tennard*, it held that the Fifth Circuit erred in denying a COA on whether the Texas capital sentencing scheme provides a constitutionally adequate means of presenting evidence of a defendant's low IQ in mitigation of punishment.

appeals' opinion, which rarely occurs, "because it appeared that the . . . analysis was incorrect and in conflict with federal precedent." *Taylor v. State*, 55 S.W.3d at 585 (Johnson, J., concurring). Although the Court dismissed the petition as improvidently granted because the trial objection did not comport with the appellate complaint, three judges dissented in a published opinion and would have remanded for consideration of the merits even though petitioner did not contend in the trial court that he was an overnight guest. The court would not have granted discretionary review unless it had grave concerns about the validity of the conviction. That the case made it to the highest court in Texas before petitioner was penalized for the procedural default – which three judges on that court were willing to overlook – demonstrates that counsels' deficient performance caused prejudiced. At a minimum, reasonable jurists could differ on this question, and the Fifth Circuit erred in concluding to the contrary.

Accordingly, this Court should exercise its supervisory powers and grant certiorari because the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and decided this case in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(a) and (c).

D. A Correct Application Of The COA Standard Would Have Resulted In The Issuance Of A COA.

Resolution of petitioner's COA motion requires discussion of the merits of his claim that he was denied the effective assistance of counsel in failing to preserve the Fourth Amendment claim. No state court addressed the merits of the Fourth Amendment claim. The trial court's

inquiry stopped when counsel failed to establish that petitioner had standing to object to the search of his luggage; the Texas Court of Criminal Appeals concluded on direct review that the claim was procedurally defaulted; and the state habeas court did not conduct an evidentiary hearing on whether the Fourth Amendment claim is meritorious. There are no state court fact findings or legal conclusions on the issue of whether counsels' deficient performance caused prejudice. Therefore, the Magistrate Judge conducted an evidentiary hearing to develop the record regarding the Fourth Amendment claim and was the first and only court to make fact findings and legal conclusions on this issue. Because the state courts did not consider whether petitioner's Fourth Amendment claim is meritorious – and because the federal courts cannot address that issue directly, *see Stone v. Powell*, 428 U.S. 465 (1976) – it is paramount that petitioner receive full and fair federal review of his Sixth Amendment claim. That has not happened.

Petitioner had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI & XIV; *Powell v. Alabama*, 287 U.S. 45 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court addressed the appropriate federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient – that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense – that counsel's errors

were so serious as to deprive the defendant of a fair trial with a reliable result. Because petitioner alleges that counsel was ineffective in relation to a Fourth Amendment claim, to prove prejudice, he must demonstrate that the Fourth Amendment claim is meritorious and that there is a reasonable probability that the outcome of the proceeding would have been different absent the excludable evidence. *Kimmelman v. Morrison*, *supra*.

1. The Police Intentionally Included False Statements In And Omitted Material Information From The Search Warrant Affidavit.

The police obtained a search warrant for Hall's residence based on an informant's tip that petitioner had drugs there. The author of the search warrant affidavit wrote that petitioner was in charge and in control of the house, and the affiant swore to this.[3] They knew that this portion of the affidavit was false, and the federal Magistrate Judge found it to be false. Rather, the officers knew at the time but omitted from the affidavit that petitioner, who was white, was a visitor and had never been in charge or in control of the house; that the owner of the house was a black man nicknamed "Duck"; and that petitioner already was in police custody at the station, not at the house, when they presented the affidavit to the magistrate. The author of the affidavit testified at the federal evidentiary hearing that he knew that the affidavit was incorrect and incomplete in these material respects. He admitted that he used a form affidavit from other cases

[3] The author of the affidavit and the affiant were different police officers.

that was not particular to the facts of this case and that he easily could have corrected it before the affiant swore to it. Both officers admitted that they intentionally and knowingly made false statements and material omissions in drafting and swearing to the affidavit.

Factual allegations made in a search warrant affidavit that are necessary to support a finding of probable cause must be truthful. *Franks v. Delaware*, 438 U.S. 154, 164 (1978). Where a defendant demonstrates by a preponderance of the evidence that false statements relevant to the probable cause determination were included in the affidavit intentionally, knowingly, or with reckless disregard for the truth, those statements must be stricken from the affidavit. *Id.* at 155-56. If the reconstructed affidavit does not establish probable cause, the search warrant is invalid, and the fruits of the search are inadmissible at trial. *Id.*

The Fifth Circuit and several Texas appellate courts also apply the *Franks* analysis and remedy in the context of material omissions from a search warrant affidavit. *See United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); *see also Darby v. State*, 145 S.W.3d 714, 722 (Tex. App. – Fort Worth 2004, pet. ref'd); *Blake v. State*, 125 S.W.3d 717, 723-24 (Tex. App. – Houston [1st Dist.] 2003, no pet.); *Heitman v. State*, 789 S.W.2d 607, 610 (Tex. App. – Dallas 1990, pet. ref'd); *Melton v. State*, 750 S.W.2d 281, 284 (Tex. App. – Houston [14th Dist.] 1988, no pet.). Where a defendant demonstrates by a preponderance of the evidence that information relevant to the probable cause determination was omitted from the affidavit intentionally, knowingly, or with reckless disregard for the accuracy of the affidavit, an appellate court must consider all of the material information that should have been included in

the affidavit. *Martin*, 615 F.2d at 328. If the reconstructed affidavit does not establish probable cause, the search warrant is invalid, and the fruits of the search are inadmissible.

In petitioner's case, when the false statements are redacted from, and the material omissions are included in, the search warrant affidavit, the reconstructed affidavit does not establish probable cause to believe that petitioner's luggage containing drugs would be found in Hall's house when the affiant presented the affidavit to the magistrate. An accurate affidavit would have asserted that:

- Petitioner is a visitor to the house, does not live there, and has never been in charge or in control of it;
- a black man nicknamed "Duck" lives at and is in charge and in control of the house;
- affiant received information from a reliable confidential informant who has been to the house within the past 24 hours and personally observed petitioner;
- the informant says that petitioner has methamphetamine concealed in a black bag at the house;
- the informant has personal knowledge of what methamphetamine looks like;
- petitioner intends to leave Sulphur Springs and drive to East Texas this morning and might take the methamphetamine;
- the informant did not observe the resident of the house, the black man nicknamed "Duck,"

possess any narcotics or other contraband; and

- at the time of the presentment of the affidavit to the magistrate, petitioner is in police custody at the Sulphur Springs police station because of a traffic violation that occurred as he drove away from the house, and he will not be found at the house.

Probable cause to support the issuance of a search warrant exists where the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably *on the premises to be searched at the time the warrant is issued. See, e.g., Illinois v. Gates*, 462 U.S. 213 (1983). Where facts and circumstances within the knowledge of a police officer, arising from a reasonably trustworthy source, would cause a person of reasonable caution to believe that items of contraband or evidence of a crime may *presently be found in a specified place*, there is probable cause to issue a warrant to search that place. *See Brinegar v. United States*, 338 U.S. 160 (1949). "Probable cause ceases to exist when it is no longer reasonable to presume that items, once located in a specified place, are still there." *Gonzales v. State*, 761 S.W.2d 809, 813 (Tex. App. – Austin 1988, pet. ref'd).

Accounting for the false statements and material omissions, based on the information that should have been in the affidavit, there would not be probable cause to believe that petitioner's black bag containing methamphetamine would be found in Hall's house when the affiant presented the affidavit to the magistrate. Stated otherwise, there would be no reason to believe that petitioner's bag would be found in the house where the officers knew that he was a temporary visitor; was leaving town within

a few hours of when the informant called the police; might take the bag with him; left the house about the time the informant said that he would; and was in police custody at the station when the affiant presented the affidavit.[4]

Had counsel preserved the Fourth Amendment claim for appellate review and developed the record adequately, petitioner likely would have prevailed on appeal. Texas courts have consistently held that a search warrant is invalid and the fruits of the search must be suppressed when the police made material false statements in the affidavit. *See, e.g., Davis v. State*, 144 S.W.3d 192 (Tex. App. – Fort Worth 2004, pet. ref'd) (police officer's false statements in search warrant affidavit – including that defendant was in control of premises – were made with reckless disregard for truth, and redacted affidavit did not provide probable cause to search premises); *Juarez v. State*, 586 S.W.2d 513 (Tex. Crim. App. 1979) (where defendant established that false statements in search warrant affidavit were made intentionally, knowingly, or with reckless disregard for truth, redacted affidavit did not provide probable cause to search house); *Grabow v. State*, 646 S.W.2d 953 (Tex. App. – San Antonio 1983, pet. ref'd) (same); *Hass v. State*, 790 S.W.2d 609 (Tex. Crim. App. 1990) (same).

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[4] Citing *Townsend v. United States*, 253 F.2d 461, 465 (5th Cir. 1958), the Magistrate Judge found that the search warrant was sufficient because it accurately described the location to be searched, even if it incorrectly stated who owned the house. However, neither *Townsend* nor the Magistrate Judge addresses petitioner's contention that the reconstructed affidavit would not state probable cause to believe that petitioner's black bag containing methamphetamine would still be found in the house.

Furthermore, Texas courts have consistently held that comparable search warrant affidavits did not provide probable cause. *See, e.g., Cassias v. State*, 719 S.W.2d 585 (Tex. Crim. App. 1986) (facts and circumstances presented in affidavit too imprecise to cause reasonable person to believe that drugs would be found at particular address at time warrant issued); *State v. Ozuna*, 88 S.W.3d 307 (Tex. App. – San Antonio 2002, pet. ref'd) (search warrant affidavit did not provide probable cause because it did not connect suspected drugs to premises where it stated only that defendant purchased drugs daily and carried them in his pants); *Lowery v. State*, 98 S.W.3d 398 (Tex. App. – Amarillo 2003, pet. den'd) (search warrant affidavit did not provide probable cause to believe that drugs would be found at premises at time warrant issued); *Wester v. State*, 109 S.W.3d 824 (Tex. App. – Dallas 2003, no pet.) (search warrant affidavit for defendant's house did not provide probable cause to believe that drugs would be found there at time warrant issued – although informant had purchased drugs there from defendant that day – because information was not sufficiently detailed).

The strong body of favorable precedent on this issue demonstrates that counsels' deficient performance caused prejudice, especially considering that the Texas Court of Criminal Appeals was primed to reverse the conviction had the issue been preserved for appellate review. Because a reconstructed affidavit does not establish probable cause to believe that drugs would still be found at the house, the search warrant is invalid, and the fruits of the search and seizure are inadmissible. At a minimum, reasonable jurists could differ on this question.

2. The Search Warrant For Hall's House Did Not Authorize The Police To Search Petitioner's Property.

Assuming *arguendo* that the affidavit provided probable cause to search the house and that the warrant was valid, it did not authorize the search of petitioner's property because the police knew that he was only a visitor to the house. *Cf. Ybarra v. Illinois*, 444 U.S. 85 (1979) (person not named in search warrant could not be searched merely because present on premises when warrant executed). Although police officers generally may search any container found in a house that is the subject of a valid warrant if the officers reasonably believe that the container could conceal the type of item described in the warrant, *United States v. Ross*, 456 U.S. 798, 821 (1982), special concerns arise when the items to be searched belong to visitors, and not occupants, of a house. Such a search exceeds the scope of the warrant when the officers have actual knowledge that the items belong to a nonresident. *See, e.g., People v. McCabe*, 144 Cal.App.3d 827, 830 (Cal. Ct. App. 1983). A houseguest does not abandon his property just by placing it on the floor. *See Childers v. State*, 281 S.E.2d 349 (Ga. Ct. App. 1981). Officers may not search the personal property of an overnight guest merely because it is not in the guest's hands. *Hummel-Jones v. Strope*, 25 F.3d 647 (8th Cir. 1994) (search of overnight bag of couple patronizing birthing clinic unlawful). The officers knew that petitioner did not live at the house, that he was a visitor, and that the bag in the guest bedroom belonged to him, not to Hall. Because they had actual knowledge that the bag belonged to a nonresident, the search and seizure exceeded the scope of the warrant. At a minimum, reasonable jurists could differ on this question.

3. The Search Warrant Was Not Issued By A Neutral, Detached Magistrate.

Moreover, the search warrant was invalid because the magistrate who signed it was neither neutral nor detached. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972); *see also Johnson v. United States*, 333 U.S. 10 (1948); *Giordenello v. United States*, 357 U.S. 480 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Shadwick*, 407 U.S. at 350.

Justice Jackson aptly explained the policy underlying the warrant requirement in *Johnson v. United States*, 333 U.S. at 13-14:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

A magistrate who lacks the "neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot authorize an otherwise unconstitutional search. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In *Lo-Ji*, the Court could not "discern when [the magistrate] was acting as a 'neutral and detached' judicial officer and when he was one with the police and prosecutors in the executive seizure." 442 U.S. at 328.

Petitioner established at the evidentiary hearing that the magistrate's involvement merged with the officers who drafted the affidavit and the prosecutor who reviewed it. He went to the police station at an officer's request while the police were drafting the affidavit instead of having the police bring it to him when it was complete; they advised him of the situation, including the information from the informant, that they had located the house, and that they had detained petitioner; he was present during radio conversations between officers regarding the stop and search of petitioner's car and the arrest; and an officer drove him to a prosecutor's house to discuss the sufficiency of the affidavit. Because he was not neutral and detached, the search warrant was invalid. At a minimum, reasonable jurists could differ on this question.

4. The Good Faith Exception To The Warrant Requirement Does Not Apply.

Finally, the good faith exception did not salvage the search warrant in this case. The affiant and the author of the affidavit led the team of officers that executed the warrant. They did not act in good faith because they did

not have an objectively reasonable basis to believe that the warrant was properly issued. *United States v. Leon*, 468 U.S. 897, 922-23 (1984). The *Leon* good faith exception to the exclusionary rule does not apply where the officers who draft the defective, "bare-bones" affidavit also execute the warrant. *Id.* at 923 n. 24. Evidence must be suppressed when the officers were dishonest or reckless in preparing the affidavit or could not have had an objectively reasonable belief that probable cause exists. *Id.* at 926. This Court carefully explained when the good faith exception does not apply:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks v. Delaware* [citation omitted]. The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York* [citation omitted]; in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S., at 610-11 . . . (POWELL, J., concurring in part); *see Illinois v. Gates*, supra, 462 U.S., at 263-264 . . . (WHITE, J., concurring in the judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably

> presume it to be valid. *Cf. Massachusetts v. Sheppard*, 468 U.S., at 988-991[.]

Leon, 468 U.S. at 923. *See also United States v. Baxter*, 889 F.2d 731 (6th Cir. 1989) (good faith exception did not apply to search warrant issued on basis of affidavit that contained knowing misstatements that, once redacted, failed to establish probable cause).

The officers made false statements in and omitted material information from the affidavit; the reconstructed affidavit does not provide probable cause to issue a search warrant; the search of appellant's bag exceeded the scope of the warrant for Hall's house; and the magistrate who issued the warrant was not neutral and detached. Accordingly, the good faith exception does not apply. At a minimum, reasonable jurists could differ on this question.

5. There Is A Reasonable Probability That The Outcome Of The Proceeding Would Have Been Different Had The Drugs Been Suppressed.

Had counsel established that petitioner had standing as an overnight guest to challenge the search and developed the record at a suppression hearing, there is a reasonable probability that the trial court would have suppressed the evidence or, had it denied the motion to suppress, that an appellate court would have reversed the conviction. Had the trial court suppressed the drugs found in petitioner's bag, there is a reasonable probability that the State would have dismissed the case, the jury would have acquitted petitioner, or any conviction would have been reversed on appeal based on legally insufficient evidence. Evidence obtained in violation of the United

States and Texas constitutions is inadmissible pursuant to article 38.23 of the Texas Code of Criminal Procedure. If the drugs were inadmissible, the evidence would have been legally insufficient to establish that petitioner possessed controlled substances. There is a reasonable probability that the outcome of the proceeding would have been different. *Kimmelman v. Morrison*, *supra*.

Neither the District Court nor the Fifth Circuit gave full consideration to the substantial evidence petitioner developed at the evidentiary hearing that supports his claim and the caselaw from this Court that undermines the conclusion that petitioner was not prejudiced by counsel's deficient performance. The intentional false statements and material omissions regarding the probable cause affidavit alone require the issuance of a COA. Combined with the inadequate search warrant and the absence of a neutral, detached magistrate, the Fifth Circuit erred in failing to apply the COA standard correctly. Petitioner's habeas claim is debatable among jurists of reason, a court could resolve the issue in a different manner, and the issue is adequate to deserve encouragement to proceed further. Accordingly, a COA should have issued.

CONCLUSION

Petitioner requests that the Court conclude that a COA should have issued, summarily reverse the judgment of the Fifth Circuit, and remand for consideration of the merits of the appeal.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40518
USDC No. 3:03-CV-20

SCOTT LYNN TAYLOR,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States,
District Court for the Eastern District of Texas

(Filed Dec. 19, 2006)

ORDER:

Scotty Lynn Taylor, Texas state prisoner # 817710, moves this court for a certificate of appealability (COA) following the district court's denial of his 28 U.S.C. § 2254 petition. In the petition, Taylor sought to challenge his state-court conviction for possession of controlled substances. *See Taylor v. State,* 995 S.W.2d 279, 280 (Tex. App. 1999). Taylor argues that the district court erred in rejecting his claim of ineffective assistance of counsel. He argues that the court erroneously concluded that his motion to

suppress evidence of the controlled substances would have been denied even if his counsel had established that he had standing to challenge the search warrant.

A COA may issue only if Taylor makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c) (2); *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Taylor has made no such showing, accordingly, his motion for a COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

SCOTTY LYNN TAYLOR	§	CIVIL ACTION NO.
VS.	§	3:03-CV-20
	§	
DIRECTOR, TDCJ-CID	§	

ORDER DENYING CERTIFICATE OF APPEALABILITY

(Filed Apr. 05, 2006)

Came on for consideration the Petitioner's Notice of Appeal and Motion for Certificate of Appealability from the dismissal of writ of habeas corpus pursuant to 28 U.S.C. § 2254.

A Certificate of Appealability may issue under 28 U.S.C. § 2253, "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1982); *Elizalde v. Dretke,* 362 F.3d 323, 328 (5th Cir. 2004). Where the petition was rejected on the merits, the Petitioner, to obtain a Certificate of Appealability, must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are worth encouragement to proceed further. *Slack v. Daniel,* 529 U.S. 473, 483-84 (2000). If the petition was denied on procedural grounds, the Petitioner must show that jurists of reason would find it debatable (1) whether the petition raises a valid claim of the denial of a constitutional right and (2)

whether the district court was correct in its procedural ruling. *Id.* at 484; *Elizalde*, 362 F.3d at 328. The Court must either issue a Certificate of Appealability indicating which issues satisfy the required showing, or state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

In this case, the standards for issuance of a certificate of appealability are not met. For the reasons stated in the Report and Recommendations previously adopted in this case, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right or that the procedural ruling was incorrect. Accordingly, the Court is of the opinion that the Certificate of Appealability should not issue in this case. It is therefore,

ORDERED that the Notice of Appeal and Motion for Certificate of Appealability (docket entries #50 & 51), are **DENIED**. The Petitioner should submit all future documents and/or motions in this case to the Fifth Circuit, as opposed to this Court.

SIGNED this 4th day of April, 2006.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

SCOTTY LYNN TAYLOR	§	
	§	CIVIL ACTION NO.
VS.	§	3:03-CV-20
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

(Filed Mar. 06, 2006)

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Don D. Bush who, after an evidentiary hearing, issued a Final Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed with prejudice. Both Petitioner and Respondent have filed objections to the Final Report and Recommendation of the United States Magistrate Judge.

The Court, having made a *de novo* review of the objections raised by the Parties to the Report, is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the Parties are without merit. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 3rd day of March, 2006.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

SCOTTY LYNN TAYLOR	§	
	§	CIVIL ACTION NO.
VS.	§	3:03-CV-20
	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

(Filed Mar. 06, 2006)

The Court, having considered the Petitioner's case and rendered its decision by opinion issued this same date, hereby **ORDERS** that the petition for a writ of habeas corpus is **DISMISSED** with prejudice.

SIGNED this 3rd day of March, 2006.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

SCOTTY LYNN TAYLOR	§	
VS.	§	CIVIL ACTION NO.
	§	3:03-CV-20
DIRECTOR, TDCJ-CID	§	

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed Jan. 27, 2006)

Petitioner Scotty Lynn Taylor, an individual confined in the Texas prison system, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

PROCEDURAL HISTORY

The Petitioner is confined in the Texas prison system pursuant to a judgment and sentence from the 8th Judicial District Court of Hopkins County, Texas, in cause no. 9714905 and 9714904, styled *The State of Texas v. Scotty Lynn Taylor*. Petitioner was charged with the felony offenses of possession of controlled substances, namely cocaine and amphetamine. Petitioner entered a plea of not guilty, and on February 18, 1998, the jury found him guilty and, thereafter, assessed punishment at ninety-nine years in prison for each offense, to be served concurrently. His conviction was affirmed on appeal. *Taylor v. State*, 995

S.W.3d 279 (Tex.App.-Texarkana, June 15, 1999, pet. dismissed). The Appeals court found that Petitioner lacked standing to object to the search because he did not meet the definition of an overnight guest. Petitioner's petitions for discretionary review were granted November 19, 1999, but were subsequently refused on September 12, 2001, as being improvidently granted. *Taylor v. State*, PDR no. 1194-99. On February 19, 2002, Petitioner's petition for writ of certiorari was denied by the Supreme Court of the United States. *Taylor v. Texas* 534 U.S. 1154 (2002). On February 13, 2003, Petitioner filed two state writ petitions challenging his possession of amphetamine and cocaine convictions. *Ex parte Taylor*, No. 55,369-01. The Texas Court of Criminal Appeals denied the applications without written order on April 30, 2003.

The present petition for a writ of habeas corpus was filed on September 26, 2003. The Petitioner challenged his conviction on several grounds all regarding Petitioner's claim he was denied the effective assistance of counsel at trial or appeal. The only ground remaining after the Court's initial Report and Recommendation is Petitioner's Fourth Amendment claim.

Petitioner filed a supplemental brief on November 14, 2003. The Director filed an answer on December 12, 2003 and a supplemental answer on August 23, 2004. Petitioner filed a reply to the Director's initial answer on January 2, 2004.

FACTUAL BACKGROUND

On October 27, 1997, Petitioner arrived at Donald Hall's house between 11:00 p.m. and midnight. (4 R.R. 9, 11). Petitioner went inside with two or three bags. *Id.*

Petitioner and Hall had been friends for many years. (4 R.R. 7-9). Petitioner was invited but did not have a key. (3 R.R. 100). Petitioner deposited his bags in a back bedroom and took a shower. (4 R.R. 11-14). After receiving information from an informant that Petitioner brought drugs into Hopkins County, Sulphur Springs police officers went to Hall's house to look for Petitioner and his car. (3 R.R. 21-23, 33, 48-49, 110). Corporal Monty Tipps saw the car and surveilled the home while another office obtained a warrant to search the house. (3 R.R. 112-15).

Approximately 6:00 a.m. the following morning, Petitioner left the house, parked on the wrong side of the road for approximately two minutes while he cleaned his windshield, then drove away. (3 R.R. 23, 51-53). Officer Brad Strawn followed Petitioner for four blocks and then pulled him over for failing to activate his turn signal 100 feet before the intersection. (3 R.R. 37, 54-56). Petitioner refused Strawn's request for consent to search the car (3 R.R. 58, 85-87). A canine search of the exterior of the car was negative (3 R.R. 30-31, 59-60). After an hour, Petitioner was arrested for parking on the wrong side of the road (3 R.R. 26, 38, 60). His car was taken to the police station and searched (3 R.R. 32)

After Petitioner's arrest but before the automobile search at the impound yard, officers executed a search warrant on the house. They found and seized luggage from the bedroom Petitioner had occupied the night before. They found a black leather bag containing cocaine and methamphetamine, a letter addressed to Petitioner, motel receipts for Petitioner, warranties for pocket scales for Petitioner, hypodermic syringes, and a brief in support of a motion to suppress evidence filed in a case for which Petitioner was awaiting sentencing. (3 R.R. 122-23,

131-32, 142-44, 148, 159, 166; 4 R.R. 19). No officer saw Petitioner enter or occupy the house nor possess the bag. Petitioner's fingerprints were not found on any of the bags contents. (3 R.R. 64-65, 159, 165).

Hall admitted that the house was his and that "a friend left some stuff there last night" (3 R.R. 116, 118, 120, 122). Hall testified that Petitioner, a long-time friend, had spent the night at his house two or three times (4 R.R. 7-9) and had left items at his house after moving from a residence. (4 R.R. 29-30). Hall knew that Petitioner's drugs were in the house when the police executed the search warrant. (4 R.R. 33-39). Hall testified that "I just know he had his bags there and he said that he going to come back and pick them up." (4 R.R. 33)

The contents of the bag were consistent with drug-dealing. (4 R.R. 104, 122-124). A chemist identified the drugs as 24.4 grams of amphetamine and 4.8 grams of cocaine. (3 R.R. 201-202). The trial court ruled, on Petitioner's motion to suppress the items found in luggage in the bedroom of Mr. Hall's house, that "he has no expectation of privacy under the laws of the State of Texas or the United States, and he does not have standing to object to the search of the residence." (3 R.R. 105). The trial court did not reach the merits of the suppression claim due to the finding of a lack of standing. The appeals court agreed that Petitioner had no standing.

THE PETITIONER'S REMAINING CLAIM

The only issue not dismissed previously is Petitioner's assertion that he was denied effective assistance of counsel when his trial attorney failed to preserve the search issue and the issue of his standing – as an overnight guest

– to object to the search of his possessions. "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the Defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2547, 91 L.Ed.2d 305 (1986).

EVIDENTIARY HEARING

The Court conducted an evidentiary hearing on January 18, 2006. The question before the Court is whether the Petitioner's counsel rendered ineffective assistance. The following witnesses were called during the evidentiary hearing:

1. *Donald Hall*

The first person called as a witness was the owner of the home searched, Mr. Donald Hall. He testified that he and Petitioner were friends; that the description of the residence in the search warrant/affidavit described his home and that his home was the only yellow house on the 800 block of Putman street; that he owned and controlled the home searched; that Petitioner did not control the home searched; that Petitioner, an invited guest, arrived at approximately 11:00 p.m.; that Petitioner brought drugs; that he and Petitioner talked and did drugs; that Petitioner showered and retired to the guest room but he was not aware whether Petitioner slept; that he (Hall) slept on the couch; that Petitioner left the next morning while he was getting ready for work; that he returned from

work after one hour and soon thereafter, police arrived to execute a search warrant; and that Petitioner said he would return for his bags but never returned.

2. *Scott Lynn Taylor*

The second person called was Petitioner. He testified that he had stayed with Hall on other occasions and was invited to stay the night; that he arrived at Hall's house at approximately 11:00 p.m.; that they talked, watched television and did drugs; that he placed his bags in the guest bedroom; that he showered and then slept in the guest bedroom from approximately 3:00a.m. until 5:00 a.m.; that he left his bags in the guest room zipped with nothing exposed; that he left the house to go to the store for breakfast for himself and Hall and intended to return shortly; that he did not return because was stopped and subsequently arrested; and that he did not own or control the house searched.

3. *Russell Stillwagoner, Brad Strawn and Monty Tipps*

The remaining witnesses were police officers involved in the search of the home and arrest of Petitioner. The testimony from these showed that Petitioner was targeted based on a tip from a confidential informant; that Petitioner left the home at approximately 6:00 a.m.; that Petitioner was arrested for traffic violations; that a black man named "Duck" was the owner of the residence; that Petitioner was a guest in the home and not the owner; that Petitioner owned and/or lived in another residence; that no consent was obtained from "Duck" – a.k.a. Donald Hall for the search; that Petitioner did not consent to the search of

his luggage; that they were looking for methamphetamines concealed a black bag at the premises; that the affidavit supporting the search warrant was drawn up by one officer based on the information provided by another officer who thereafter signed the affidavit; and that Petitioner was in custody when the search warrant was issued alleging that Petitioner was "in charge of and controlled" the described premises. The police officers disagreed on the type and amount of involvement of the magistrate issuing the warrant. One officer stated that the magistrate was given oral updates on the progress but did not accompany the officers to see the prosecutor. Another officer remembered the magistrate actually being present and involved in the discussions regarding the information in the affidavit and the issuance of the warrant.

PROPOSED FINDINGS OF FACT

After considering all of the evidence and testimony, the Court makes the following proposed findings of fact:

1. Petitioner was an overnight guest of Donald Hall;

2. Petitioner was not in charge of or in control of the searched premises;

3. Petitioner had an expectation of privacy in his luggage as an overnight guest but the expectation of privacy did not rise to the level of being in charge of or in control of the searched premises;

4. Petitioner's luggage and the methamphetamine within it were found pursuant to a search warrant obtained pursuant to an affidavit and based on information provided by a confidential informant;

5. The affidavit was not made defective by the language "said suspected place and premises are in charge of and controlled by each of the following persons: white male, Scotty Lynn Taylor D.O.B. 07/10/63 and person or persons whose names, identities, and descriptions are unknown to affiant."

6. Petitioner's trial attorneys, Matt Keil and John Goodson, did not raise the issue of Petitioner's status as an overnight guest during the suppression hearing;

7. Petitioner cannot show, had the trial court found standing to bring the suppression motion and allowed further testimony at the hearing, that the suppression motion would have been successful;

8. Petitioner cannot show that his Fourth Amendment claim is meritorious;

9. Petitioner cannot show that, but for the failure to bring the overnight guest issue before the trial court, Petitioner would have been successful in suppressing the drugs and that the verdict would have been different;

10. Petitioner can show that Matt Keil and John Goodson's representation fell below an objective standard of reasonableness;

11. Petitioner cannot show prejudice, i.e. that there was a reasonable probability that, but for trial counsel's alleged unprofessional errors, the results of the proceeding would have been different.

DISCUSSION AND ANALYSIS

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1354, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996). In the course of reviewing state proceedings, a federal court does not sit as a super state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

The prospect of federal courts granting habeas corpus relief to state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996. The new provisions of Section 2254(d) provide that an application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See Williams v. Taylor*, 529 U.S. 362, 402-413 (2000); *Childress v. Johnson*, 103 F.3d at 1224-1225. The statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002).

A decision by a state court is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the law set forth in" the Supreme Court's cases. *Williams v. Taylor*, 529 U.S. at 405-06. A federal court's review of a decision based on the "unreasonable application" test should only review the "state court's 'decision' and not the written opinion explaining that decision." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002 (*en banc*). "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. at 411. Rather, that application must be objectively unreasonable. *Id.* at 409. The standard is satisfied only if "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Davis v. Johnson*, 158 F.3d 806, 812 (5th Cir 1998) (internal quotation marks and citations omitted).

The trial court's factual findings are entitled to a presumption of correctness unless the petitioner can rebut the presumption with clear and convincing evidence to the contrary. *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001). A federal district court must be deferential to state court findings supported by the record. *See Pondexter v. Dretke*, 346 F.3d 142, 149-152 (5th Cir. 2003). A state application denied without written order by the Texas Court of Criminal Appeals, as in the present case, is an adjudication on the merits. *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an

adjudication on the merits while a "dismissal" means the claim was declined on grounds other than the merits).

The petitioner is not entitled to relief because he has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. *See Moore v. Cockrell*, 313 F.3d 880, 882 (5th Cir. 2002).

THE PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

The petitioner claims ineffective assistance of counsel. In order to succeed on a claim of ineffective assistance of counsel, a petitioner must first show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonably professional judgment. *Id.* at 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981). *See also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). Second, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* at 697.

Petitioner can show that he was an overnight guest. Petitioner can show that his trial counsel failed to raise the subject of overnight guest status during the suppression hearing and that the court found that Petitioner did not have standing to object to the search of Donald Hall's home. However, Petitioner cannot show that the warrant was fundamentally defective due to the phrase in the supporting affidavit that "said suspected place and premises are in charge of and controlled by each of the following persons . . . Scotty Lynn Taylor." Therefore, he cannot show that the result of the suppression hearing would have been the suppression of the drugs. Petitioner asserts that the use of this false language negates probable cause and requires that the language be redacted. He asserts that after redaction, nothing would connect Petitioner to the house searched or the drugs found. However, even after redaction, the police officers would have been able to identify and find the residence searched and locate a black bag containing methamphetamine within that residence. Within the luggage, along with the drugs, were documents containing Petitioner's name and other indicia of ownership by Petitioner.

"A search warrant must be supported by an affidavit setting forth substantial facts establishing probable cause for its issuance. Probable cause to support the issuance of a search warrant exists when the facts submitted to the

magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises at the time the warrant is issued. . . . We examine the four corners of the affidavit to determine whether probable cause exists. Reasonable inferences may be drawn from the affidavit, however, and the affidavit must be interpreted in a common sense and realistic manner." *Wilson v. State* 98 S.W.3d 265 (270-272 (Ct.App–Houston[1st Dist], 2003) (internal citations omitted). If the warrant to search, as here, is directed at the location and not the person and, as here, the warrant accurately identified and described the location and was sufficient to enable the officer to readily find it, that is enough. *Townsend v. U.S.* 253 F.2d 461, 465 (5th Cir. 1958). "In *Steele v. United States*, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925) the Supreme Court announced the test generally recognized as controlling in judging the sufficiency of a description in a search warrant of the premises to be searched. The Supreme Court said: 'It is enough if the description is such that the officers with the search warrant can, with reasonable effort ascertain and identify the place intended." In interpreting this test announced by the Supreme Court in *Steele*, Judge Mansfield stated in *United States v. Gomez*, D.C.N.Y., 1967, 32 F.R.D. 347: 'The standard for determining whether a search warrant complies with constitutional requirements is one of practical accuracy rather than technical nicety.'" *United States of America v. Melancon*, 462 F.2d 82, 93-94 (5th Cir. 1972). Petitioner cannot show that the evidence would have been excludable had the trial court continued to the merits rather than simply finding a lack of standing.

Even assuming *arguendo* that the information attacked by Petitioner – that the house was in his charge or

control – was false and must therefore be redacted from the affidavit, sufficient information remained to support probable cause for a search. Contained within the affidavit was information showing that a confidential informant whom had previously provided reliable, true and correct information, and was familiar with Petitioner and methamphetamines, had seen Petitioner in possession of drugs contained in a black bag, located in a yellow house in the 800 block of Putman Street, three houses west of Mitchell Street within the last 24 hours.

Because it cannot be shown that the Fourth Amendment argument would have been successful in excluding the items found pursuant to the valid search warrant, Petitioner cannot show prejudice in his trial counsel's failure to allege and prove his overnight guest status.

RECOMMENDATION

It is accordingly recommended that the motion pursuant to 28 U.S.C. § 2254 should be denied and the case should be dismissed with prejudice.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal

conclusions accepted and adopted by the district court. *Douglas v. United States Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 28 day of January, 2006.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES
MAGISTRATE JUDGE

APPENDIX F

TEXAS COURT OF CRIMINAL APPEALS

Case # WR-55,369-01 -> Event: ACTION TAKEN

Event Type:	ACTION TAKEN
Descrition:	Application for Writ of Habeas Corpus – 11.07
Date:	4/30/2003
Disposition:	HC relief denied WITHOUT written order.

APPENDIX G

TEXAS COURT OF CRIMINAL APPEALS

Case # WR-55,369-02 -> Event: ACTION TAKEN

Event Type:	ACTION TAKEN
Descrition:	Application for Writ of Habeas Corpus – 11.07
Date:	4/30/2003
Disposition:	HC relief denied WITHOUT written order.

APPENDIX H

SUPREME COURT OF THE UNTIED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 19, 2002

Mr. Walter M. Reaves Jr.
P.O. Box 55
West, TX 76691

Re: Scotty Lynn Taylor
v. Texas
No. 01-7708

Dear Mr. Reaves:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX I

55 S.W.3d 584

[SEAL]

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

NO. 1194-99 & 1195-99

SCOTTY LYNN TAYLOR, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION
FOR DISCRETIONARY REVIEW

FROM THE SIXTH COURT OF APPEALS

HOPKINS COUNTY

Keller, P.J., *delivered the opinion of the Court in which KEASLER, HERVEY, and HOLCOMB, J.J., joined. JOHNSON, J., filed a concurring opinion. WOMACK, J., filed a dissenting opinion in which MEYERS, and PRICE, J.J., joined.*

OPINION

The State charged appellant with possession of cocaine and possession of methamphetamine. Appellant filed a motion to suppress the evidence seized from the home. The trial court denied the motion, concluding that

appellant had no standing to object to the search because he had no reasonable expectation of privacy in his friend's residence. Appellant was convicted of the offenses. The Court of Appeals affirmed. We granted appellant's petition for discretionary review.

Having examined the record and briefs and considered the arguments in the case, we have reached the conclusion that our decision to grant review was improvident. We therefore dismiss the appellant's petition as improvidently granted.

KELLER, P.J.

DELIVERED: September 12, 2001

PUBLISH

Johnson, J., *filed a concurring opinion.*

CONCURRING OPINION

I concur in the decision to dismiss appellant's petition as improvidently granted. I write separately to explain my reasons for doing so.

In the instant case, the court of appeals acknowledged that, under the relevant case law, an overnight guest has a legitimate expectation of privacy sufficient to allow him to assert a Fourth Amendment claim. *Taylor v. State,* 995 S.W.2d 279, 281-2 (Tex. App. – Texarkana 1999). It also acknowledged that according to the evidence, appellant arrived at the house between 11:00 p.m. and midnight, and that he left sometime just before 6:00 a.m. *Id.* at 280.

Despite this, however, the court made the following questionable determination:

> The facts in this case do not precisely fit the definition of an overnight guest. It is clear that Taylor went to the house at night and that he showered there and visited with his friend. There is no suggestion that he slept there or otherwise behaved as an 'overnight guest.' His acts were more akin to those of a friend visiting during the day. Although he was indisputably there at night, the evidence indicates that his presence was not as the type of 'overnight guest' discussed by the cases above. The State correctly points out that there is no evidence of any intent to return to the house, and there is evidence that he had left items for a substantial length of time in a form of unpaid storage at Hall's house on previous occasions.

Id. at 282. The Supreme Court has stated that one's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Minnesota v. Olson,* 495 U.S. 91, 96, 110 S. Ct. 1684, 1688, 109 L. Ed. 2d 85 (1990). Thus, we granted appellant's petition for discretionary review because it appeared that the court of appeals's analysis was incorrect and in conflict with federal precedent.

However, an examination of the record in this case reveals that appellant's status as an overnight guest was not established before the trial court. As the proponent of the motion to suppress evidence, appellant had the burden of establishing that his Fourth Amendment rights were violated by the challenged search or seizure. *Rawlings v. Kentucky,* 448 U.S. 98, 104-5, 100 S. Ct. 2556, 2561, 65 L.

Ed. 2d 633 (1980); *Rakas v. Illinois,* 439 U.S. 128, 130 n.1, 99 S. Ct. 421, 424 n.1, 58 L. Ed. 2d 387 (1978). At the hearing on the motion to suppress, defense counsel's attempt to establish such a violation consisted of the following direct examination:

> [Defense Counsel:] Now on or about October 28, 1997, did you have certain luggage that was stored at 805 Putman Street?
>
> [Appellant:] Yes, I did.
>
> [Defense Counsel:] Did you have a reasonable expectation of privacy?
>
> [Appellant:] Yes, I did.
>
> [Defense Counsel:] Of the contents of that luggage?
>
> [Appellant:] Yes, sir.
>
> [Defense Counsel:] And how many pieces of luggage did you have there?
>
> [Appellant:] Two or three.

Moreover, an exchange between the prosecutor and defense counsel indicates that appellant's claim of a Fourth Amendment violation was based not on his status as an overnight guest, but on an expectation of privacy regarding his luggage. Defense counsel objected to the prosecutor's attempt to show the length of time at which appellant was at the house, and the following occurred:

> [Prosecutor:] Judge, it goes to whether or not he was an overnight guest, whether he was just visiting in the house or whether he just dropped stuff off.

> [Defense Counsel:] That's not true, Judge. He's talking about whether or not you have an expectation of privacy of the entire house. We're talking about specific luggage. And I can cite numerous cases that have been upheld by not only by the U.S. Supreme Court but also by the Court of Appeals that deal specifically with luggage. And the case in point deals with luggage that was found at a person's feet in an automobile that he didn't claim any interest in.

Although the information concerning when appellant arrived at and left the house did come before the trial court, it came in during the trial on the merits, not during the motion to suppress. Moreover, nothing in the record indicates that the defense attempted to use that evidence to argue that appellant was an overnight guest and so had a valid Fourth Amendment claim, or asked the trial court to reconsider its ruling on the motion to suppress in light of this evidence.

Nevertheless, appellant argued at the court of appeals that the trial court erred in denying the motion to suppress because appellant was an overnight guest. Thus, appellant's trial objection did not comport with the issue raised on appeal, and he therefore did not preserve error on the issue of whether he had a valid Fourth Amendment claim because he was an overnight guest. Tex. R. App. P. 33.1(a); *Ibarra v. State,* 11 S.W.3d 189, 197 (Tex. Crim. App. 1999), *cert. denied,* 531 U.S. ___, 121 S. Ct. 79, 148 L. Ed. 2d 41 (2000). As such, the court of appeals reached the correct result, even if for the wrong reasons. Therefore, I

concur in the decision to dismiss the petition as improvidently granted.

Johnson, J.

Date Delivered: September 12, 2001

Publish

Womack, J., filed a dissenting opinion, in which Meyers and Price, JJ., joined.

We granted discretionary review of the Court of Appeals' decision that the appellant did not have an overnight guest's right to privacy in the premises where evidence was seized during a search of his luggage. There are two threshold issues that the Court of Appeals did not address.

One is whether the question was preserved for review. Preservation of error is a systemic requirement.[1] Ordinarily a first-level appellate court should review the record on its own motion to determine whether the appellant properly preserved the points of error for review.[2] Our rules require that a claim of error must be based on a timely, specific objection.[3] It does not appear that the appellant argued in the trial court that he was an overnight guest. Therefore, rather than dismiss the petition, we should grant review of this question on our own motion,[4] vacate

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[1] *Jones v. State,* 942 S.W.2d 1, 2 n.1 (Tex. Cr. App. 1997).

[2] *Ibid.*

[3] *See* Tex. R. App. P. 33.1(a)(1); Tex. R. Evid. 103(a)(1).

[4] *See* Tex. R. App. P. 67.1.

the judgment of the Court of Appeals, and remand the case to that court for consideration of that issue.

Such a remand would give the Court of Appeals the opportunity to consider the second threshold question: whether evidence that was admitted during the trial should be considered on the question of whether the trial court's pre-trial ruling was erroneous.[5]

---

[5] *See Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Cr. App. 1996); *Hardesty v. State*, 667 S.W.2d 130, 135 n.6 (Tex. Cr. App. 1984).

APPENDIX J

995 S.W.2d 279

[SEAL]

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-98-00072-CR

SCOTTY LYNN TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 8th Judicial District Court
Hopkins County, Texas
Trial Court No. 9714904

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Justice Ross

OPINION

(Filed June 15, 1999)

Scotty Taylor appeals from his conviction for possession of between four and two hundred grams of a controlled substance. He was convicted by a jury, which assessed punishment at ninety-nine years' imprisonment and a $10,000.00 fine.

Taylor first contends that the trial court erred by refusing to permit him to pursue a Fourth Amendment claim attacking the search of a residence. The court ruled that he had no standing to bring such a claim. The evidence shows that Taylor drove to Donald Hall's house between 11:00 p.m. and midnight. Taylor went inside with two or three bags. The evidence shows that he and Hall had been friends for many years. Taylor deposited his bags in a back bedroom and took a shower. At about 3:00 a.m., local police received a tip from a confidential informant that Taylor was at the house and had drugs. An officer went to the house and confirmed that Taylor's car was there and set up surveillance on the house, while another officer began preparations for obtaining a search warrant.

Shortly before 6:00 a.m., Taylor drove away from the house. The officers watched him pull over and park on the wrong side of the road. Taylor got out of the car and cleaned the windshield, then got back into the car and drove away. One officer followed him. After four blocks, the officer stopped Taylor for failing to "signal continuously one hundred feet before the intersection." The other officer also arrived, and they asked Taylor to consent to a search. Taylor refused. The officers called for a canine unit, which arrived about twenty minutes later. The dog found nothing. Finally, after about an hour had passed, the officers arrested Taylor for "parking on the roadway facing traffic."

The officers then impounded the car and took it to the police station, where they performed an inventory search. They found nothing. At 11:15 a.m., they obtained a search

warrant for the car and searched it again. A large number of items were found in the car, but no drugs were located.[1]

Before the automobile search, officers executed a search warrant on the house at about 8:00 a.m. They found and seized Taylor's luggage. Inside the luggage they found five grams of cocaine and forty grams of amphetamines.

Taylor sought to suppress this evidence. The trial court refused to conduct a hearing and address the question on the merits because it concluded that Taylor had no standing to raise the issue.

The term "standing" is often used in cases involving Fourth Amendment claims in this contest, but this term has been replaced by the concept that a defendant must be able to show a legitimate expectation of privacy prior to asserting the claim. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A subjective expectation of privacy is treated as being legitimate if it is one that society is prepared to recognize as reasonable. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In applying this analysis, the Fourth Amendment protections are available if the defendant's expectation of privacy has a source outside of the Fourth Amendment, "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* at 439 U.S. 143 n.12. Privacy interests are an element of a Fourth Amendment claim

[1] The officers did find a small plastic bag with what was described as an unidentified white residue inside a magnetic key holder hidden behind the ashtray. There is, however, no testimony as to what that "residue" was.

that the defendant has the burden of proving. *Villareal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Wilson v. State*, 692 S.W.2d 661, 669 (Tex. Crim. App. 1984).

To carry his burden of proof, the accused must normally prove that by his conduct he exhibited an intention to preserve something as private and that circumstances existed under which society is prepared to recognize his subjective expectation as being objectively reasonable. *Villareal*, 935 S.W.2d at 138, *citing Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). Some relevant factors in determining whether the subjective expectation was one that society was prepared to recognize as reasonable include whether the accused had some property or possessory interest in the place invaded, whether he was legitimately in the place invaded, whether he had the right to exclude others from the place, whether he took precautions typically taken by those seeking privacy, whether he put the place to some private use, and whether his claim of privacy is consistent with historical notions of privacy. *Villareal*, 935 S.W.2d at 138.

An overnight guest is the type of individual the Court has explicitly acknowledged as having a legitimate expectation of privacy. *Minnesota v. Olson*, 495 U.S. 91, 99, 110 S.Ct. 1684, 109 L.Ed.2d 85, 94-95 (1990). In reaching that decision, the Court refused to apply a multi-factor test proposed by the state in deciding whether the defendant's relationship to the premises was adequate to permit him to raise a privacy claim. *Id.* at 495 U.S. 96-97. Instead, the Court stated that the defendant's "status as an overnight guest alone is enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id.*

The overnight guest is used by the Court in its analysis at one end of a spectrum, with the casual visitor anchoring the other end. Thus, the Court has again recently stated that the legitimate expectation of privacy does not extend beyond the overnight guest in a home to include one who is merely present with the consent of the homeowner. *Minnesota v. Carter*, 525 U.S. ___, 119 S.Ct. 469, 142 L.Ed.2d 373, 380 (1998). In *Carter*, the Court discussed *Olson* and its predecessors and concluded that a guest present only for a business transaction had no legitimate expectation of privacy and could not contest a search. In reaching that conclusion, the Court noted that they were not overnight guests, were there only a matter of hours, had no previous relationship with the owner, had no other purpose for their visit, and nothing suggested any degree of acceptance into the household. In short, it was simply a place for them to do business. *Id.*

In this case, the evidence shows that Taylor and Hill were boyhood friends, and their friendship indicates that their meeting was not solely for business purposes. Taylor had spent nights at Hill's house for years on an irregular basis. Unlike the cases cited above, however, at the time of the search, Taylor was not present in the residence.

The facts in this case do not precisely fit the definition of an overnight guest. It is clear that Taylor went to the house at night and that he showered there and visited with his friend. There is no suggestion that he slept there or otherwise behaved as an "overnight guest." His acts were more akin to those of a friend visiting during the day. Although he was indisputably there at night, the evidence indicates that his presence was not as the type of "overnight guest" discussed by the cases above. The State correctly points out that there is no evidence of any intent

to return to the house, and there is evidence that he had left items for a substantial length of time in a form of unpaid storage at Hall's house on previous occasions.

Application of the factors set out by the Texas Court of Criminal Appeals in *Villareal* also tend to support a finding of no subjective expectation of privacy. Taylor had no property or possessory interest in the house, he had no form of dominion or control, and he did not have a key to the house. He merely left unlocked and otherwise unsecured bags in an unlocked room, and the evidence shows only that he showered in the house and visited with a friend. On the other side of the equation, he was legitimately there (before he left), and it is arguable that a person visiting a friend, who leaves his luggage in the friend's house, has a claim of privacy that is consistent with historical notions of privacy.[2]

We conclude that even in light of the Supreme Court's analyses in *Olson* and its progeny, the facts of this case are distinguishable. The evidence shows that Taylor had not truly been an overnight guest, and had left his unsecured bags in the residence, and that he had left bags there before in a type of storage. There is no proof that he intended to promptly return. The court could reasonably have concluded that any visit had terminated and that the bags had simply been left in Hall's care. This situation differs sufficiently from the cases involving an "overnight guest" to permit the trial court to conclude that Taylor no

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[2] In other contexts, there is a lack of "standing" to contest the reasonableness of a search of abandoned property which occurs when the defendant intended to abandon the property and the decision to abandon was not due to police misconduct. *See Brimage v. State*, 918 S.W.2d 466, 507 (Tex. Crim. App. 1994).

longer had an objectively reasonable expectation of privacy as to the property, or alternatively that Taylor's acts did not adequately show a genuine intention to preserve the items as being truly private. We find no error.

Taylor next contends that the court erred by failing to suppress evidence obtained from his automobile as a result of an illegal arrest.[3] He argues that the arrest was unlawful because he was placed in custody by an officer – without a warrant – who did not observe the criminal activity. Despite a detailed review of the record, we have been unable to locate any argument before the trial court that raised this claim. To preserve error for appellate review, the complaining party must make a timely, specific objection. *Armstrong v. State*, 718 S.W.2d 686, 699 (Tex. Crim. App. 1985). The complaining party must obtain an adverse ruling from the trial court. *DeRusse v. State*, 579 S.W.2d 224, 235 (Tex. Crim. App. [Panel Op.] 1979). Finally, the point of error on appeal must correspond to the objection made at trial. *Dixon v. State* Nos. 021-98, 022-98, 1998 WL 870247, at *2 (Tex. Crim. App. Dec. 16, 1998); *Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). In this case, the trial court never had the opportunity to rule upon the issue now raised on appeal. This contention of error has not been preserved for appellate review.

Taylor next contends that the trial court improperly allowed the State to introduce evidence at the guilt/innocence phase of the trial about the characteristics of

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[3] None of the items so obtained is such as to show the existence of a crime. They include a magnetic key holder, a small envelope, a ledger from the Mercedes Corporation, Blu-Dri drying agent, a "bionic ear," a scanner, an electric knife, and a travel iron.

drug traffickers. This evidence was introduced by the State in the form of expert testimony concerning various items, in addition to the controlled substances, found inside Taylor's luggage. The complained-of testimony describes documents introduced into evidence as apparent balance sheets for drug sales. Other testimony explained why drug dealers would want a list of radio frequencies for local law enforcement agencies, and the purpose of baggies, calculators, scales, and cutting agents when used in the course of drug transactions.

Taylor contends that none of this evidence is relevant and that the court erred by admitting it over his objection. TEX. R. EVID. 402 provides that relevant evidence is admissible unless excluded by law. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. EVID. 401. We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996); *Montgomery v. State*, 810 S.W.2d 372, 379-80 (Tex. Crim. App. 1990). We will not reverse a trial court whose ruling was within the "zone of reasonable disagreement." *Green*, 934 S.W.2d at 102; *Montgomery*, 810 S.W.2d at 391 (opinion on reh'g).

In this case, the information provided by the expert explained to the jury a potential use of devices for unlawful purposes and described the account-keeping system often used by drug dealers. Such evidence is clearly relevant, in that it would permit the jury to make a more informed decision. Thus, it tends to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence. We cannot conclude under these facts that the trial court erred by finding the evidence to be relevant. This contention of error is overruled.

Taylor finally contends that the trial court erred by informing the jury, in response to its question, that the sentences in the two cases would run concurrently.[4] Taylor objected to the answer because it informed the jury of the result of its assessment of punishment. The court noted that TEX. PEN. CODE ANN. § 3.03 (Vernon Supp. 1999) specifically states that when an accused is found guilty of more than one offense arising out of the same criminal episode, prosecuted in a single action, the sentences shall run concurrently. The Texas Court of Criminal Appeals has held that a court does not abuse its discretion by submitting an instruction informing the jury that sentences will run concurrently in a case such as Taylor's and that such information is "a proper matter for jury consideration." *Haliburton v. State*, 578 S.W.2d 726, 729 (Tex. Crim. App. [Panel Op.] 1979); *accord Gordon v. State*, 633 S.W.2d 872, 879 (Tex. Crim. App. [Panel Op.] 1982); *Dickson v. State*, 986 S.W.2d 799, 804 (Tex App. – Waco 1999, no pet. h.).

Taylor complains on appeal that this is not necessarily a correct statement of the law in this particular case, because the cases were not properly consolidated into a single criminal action by a motion by the State, as required by TEX. PEN. CODE. ANN. § 3.02 (Vernon 1994). The Texas Court of Criminal Appeals has held that a

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[4] Taylor's other case on appeal, No. 06-98-00073-CR, is also being decided this day.

defendant is prosecuted in "a single criminal action" whenever allegations and evidence of more than one offense arising out of the same criminal episode, as that term is defined in Chapter 3, are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several. In the absence of some form of waiver, if the facts show the proceeding is a single criminal action based on charges arising out of the same criminal episode, the trial court may not order consecutive sentences. *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). The trial court's statement of the law was correct. Error has not been shown.

The judgment is affirmed.

/s/ Donald R. Ross
Donald R. Ross
Justice

Date Submitted: June 14, 1999
Date Decided: June 15, 1999

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APPENDIX K

[SEAL]

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-98-00073-CR

SCOTTY LYNN TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 8th Judicial District Court
Hopkins County, Texas
Trial Court No. 9714905

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Chief Justice Cornelius

OPINION

(Filed June 15, 1999)

Scotty Taylor appeals from two separate convictions for possession of a controlled substance, between four and 200 grams. He was convicted by a jury, which assessed punishment at ninety-nine years' imprisonment and a $10,000.00 fine in each case. Both cases are currently before this Court on appeal.

Since the briefs and arguments raised are identical in both appeals, for the reasons stated in *Taylor v. State*, No. 06-98-00072-CR, we likewise resolve the issues in this appeal in favor of the State.

The judgment of the trial court is affirmed.

/s/ William J. Cornelius
William J. Cornelius
Chief Justice

Date Submitted: June 14, 1999
Date Decided: June 15, 1999

Do Not Publish

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40518

SCOTT LYNN TAYLOR

Petitioner – Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent – Appellee

Appeal from the United States District Court for the Eastern District of Texas, [Paris]

(Filed Feb. 23, 2007)

Before DAVIS, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

A member of this panel previously denied a certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

IT IS FURTHER ORDERED that the motion of appellant for leave to file brief in support of his motion for reconsideration is GRANTED.